

Internal Revenue Service
memorandum

CC:TL:Br3
GEBowden

date: APR 11 1988

to: Assistant District Counsel,
Washington, DC MA:WAS

from: Director, Tax Litigation Division CC:TL

subject: [REDACTED] v. Commissioner
Docket No. [REDACTED] "S"

Your memorandum of March 22, 1988 requested our approval of a concession of the Tax Court filing fee of \$[REDACTED] in the above-referenced case. We agree that based on the facts in the case petitioner is not entitled to an award of costs, but that the equities favor a concession.

As discussed more fully in your memorandum, petitioner received a statutory notice of deficiency without being allowed to document the reasonableness of her position with regard to the Social Security payments. In fact, our report of examination changes that required that petitioner document her position is dated the same day as the statutory notice. The issuance of the notice cannot be justified on the basis of imminent expiration of the statute of limitations since eight months remained until that event.

Our memorandum to you dated December 18, 1987 provided technical advice on a similar case ([REDACTED]). As in the instant case we concluded that concession of the filing fee was the most appropriate course of action.

As in the [REDACTED] case, the applicable statute is I.R.C. § 7430 (as amended by the 1986 Tax Reform Act). The petitioner is the "prevailing party" here with regard to the Social Security income which was the subject of the petition, since we conceded. Thus, petitioner meets the definition provided in § 7430(c)(2)(A). It also seems clear that petitioner exhausted her administrative remedies in conformance with § 7430(b)(1) since no response to the petitioner's submission was made other than the statutory notice of deficiency. Minahan v. Commissioner, 88 T.C. 492 (1987).

The remaining question is whether the Service's position was reasonable. Section 7430(c)(4) defines the position of the United States to include "any administrative action or inaction by the District Counsel of the Internal Revenue Service (and all

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subsequent administrative action or inaction) upon which such proceeding is based." Previous cases (e.g. Baker v Commissioner, 83 T.C. 822 (1983)) have held that pre-litigation behavior should be considered in this context. It is the Service's position that the statute as amended in 1986 (quoted above) will eliminate consideration of administrative actions prior to the involvement of District Counsel.

Here, our position prior to the petition can fairly be characterized as unreasonable. However, under § 7430(c)(4) it is the Service's actions after District Counsel receives the case that determine whether the Service's position is unreasonable for the purpose of an award of costs. After the petition was filed, however, a settlement was reached as quickly as possible once petitioner's position on the Social Security payment was substantiated. Accordingly we do not believe that our post-petition position was unreasonable, and petitioner is not strictly entitled to an award of costs.

We agree, however, that the equities favor petitioner. Petitioner is apparently a retiree on a fixed income who was required to incur the petition filing fee to prevent an assessment of taxes that she did not owe, and our agent's actions seem overzealous to say the least. Our position on the amended § 7430 has yet to be tested. Because of the unfavorable equities noted above, we do not believe that this would be an appropriate vehicle for testing the position. Consequently, and also because the sum involved is small, we agree that litigation of this issue is undesirable.

Accordingly, we approve the concession of the petition filing fee of \$ [REDACTED] in this case.

MARLENE GROSS
Director
Tax Litigation Division

By:


DANIEL J. WILES
Chief, Branch 3
Tax Litigation Division